IN THE MISSOURI SUPREME COURT
EN BANC

STATE EX REL. BOBBY JOE MAYES,	)	
	)	
RELATOR,	)	
	)	
VS.	)	NO. SC85657
	)	
THE HON. JOHN D. WIGGINS,	)	
	)	
RESPONDENT.	)	

ON PRELIMINARY WRIT OF PROHIBITION
FROM THE SUPREME COURT OF MISSOURI, EN BANC
TO THE HON. JOHN D. WIGGINS,
CIRCUIT JUDGE OF PULASKI COUNTY

RELATOR'S REPLY BRIEF

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CORRECTIONS AND CLARIFICATIONS

1) The following statement appears in relator's initial brief:

> "In the present case, because Mr. Mayes has been convicted but not yet sentenced, §565.040.1 applies and requires that Mr. Mayes be *resentenced* to life imprisonment."

(App.Br. 6-17, emphasis added).

Because Mr. Mayes has not been sentenced, Mr. Mayes' brief should have stated he is asking the Court to order that he be *sentenced*, not *resentenced*, to life imprisonment.[1]

2) Respondent's statement of facts may be misconstrued as indicating relator sought a new penalty phase trial *after* this Court issued *State v. Whitfield*, 107 S.W.3d 253 (Mo.banc 2003). (Resp.Br. 13, last

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[1] The statutory sentence for first degree murder is "either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor; except that, if a person has not reached his sixteenth birthday at the time of the commission of the crime, the punishment shall be imprisonment for life without eligibility for probation or parole, or release except by act of the governor." §565.020.2. For brevity, relator will refer to the statutory "life" sentence for first degree murder as "life imprisonment."

paragraph). This is incorrect: subsequent to *Whitfield*, relator moved only to be sentenced to life imprisonment. To clarify, the sequence of events was as follows:

May 20, 2003: Jury returns verdicts of unable to agree on punishment (A1-2);

June 16, 2003: Relator files "Motion for Directed Sentence of Life Imprisonment Without Possibility for Parole, or in the Alternative; Motion for New Penalty Phase Trial;"

June 17, 2003: This Court issues *State v. Whitfield*, 107 S.W.2d 253 (Mo.banc 2003);

July 18, 2003: Relator files "Motion for Trial Court to Sentence Defendant To Life Without Possibility of Probation or Parole."

REPLY ARGUMENT

A writ prohibiting respondent from doing anything other than setting aside his order of a new penalty phase trial and sentencing relator to life imprisonment is appropriate. Neither *Sattazahn v. Pennsylvania*, Sections 1.140, 565.030.4, or 565.040.1, nor any other provision of the law requires or authorizes a penalty phase retrial in the underlying criminal case. The law requires respondent to sentence relator to life imprisonment without probation or parole.

Whitfield and Baker support relator's contention that he must be sentenced to life imprisonment.

As a preliminary matter, respondent's contention that neither *State v. Whitfield* 107 S.W.2d 253 (Mo.banc 2003) nor *State ex rel. Baker*, 136 S.W.3d 491 (Mo.banc 2004) "require a life sentence to be imposed when the jury hangs during capital murder penalty phase deliberations" is incorrect (Resp.Br. 18). Respondent overlooks that *Baker* had two holdings. First, this Court held the trial court exceeded "its jurisdiction in granting a new trial once the time periods for doing so had lapsed. " 136 S.W.3d at 493-94. Second, this Court considered and rejected the contention of the respondent in *Baker* that *Whitfield* did not apply. *Id.*

at 494. The Court held both *Ring v. Arizona*, 536 U.S. 584 (2002), and *Whitfield* applicable as Mr. Baker's case was "pending" when those opinions were issued, and accordingly, under *Whitfield*, the trial court's "only option was to impose a sentence of life." *Id*.

A Writ of Prohibition is the appropriate remedy.

In his initial brief, relator fully addressed the appropriateness of a writ of prohibition to remedy the unauthorized actions of respondent in the underlying criminal case; in lieu of repeating himself, relator respectfully directs the Court's attention to relator's initial brief at 15, and 17-18.

The law does not require or authorize retrial when the jury is unable to decide or agree upon punishment in the penalty phase of a capital case.

Relying on *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), respondent argues, "a retrial following a hung jury in the penalty phase of a capital murder trial is constitutionally permissible" (Resp.Br. 18). As *Sattazahn* indicates, in ***some*** instances, a retrial following a hung jury will not violate the Double Jeopardy Clause. But in generalizing from *Sattazahn* to imply that retrial is *always* constitutionally permissible, respondent's argument sweeps too broadly.

Sattazahan does not help respondent because it did not address the

specific issues raised here. Mr. Sattazahn claimed the Double Jeopardy Clause precluded the state from seeking, and the court from imposing, a penalty of death upon retrial, 537 U.S. at 103-05. Unlike Mr. Sattazahn, relator does not rely on the Double Jeopardy Clause.

The cases are similar only in that the jury in each case was unable to agree on punishment at the sentencing phase. The similarity ends there. In relator's underlying criminal case, respondent ordered a new penalty phase trial, whereas the trial court in Mr. Sattazahn's case sentenced him to life imprisonment. *Id.*; Relator's Initial Brief A1.

After being sentenced to life imprisonment, Mr. Sattazahn sought and obtained a new trial. *Id*. at 105. His attempts to preclude the state from seeking the death penalty at the retrial were unsuccessful, and the jury assessed a sentence of death. *Id*. The Pennsylvania Supreme Court denied relief, and the Supreme Court granted certiorari. *Id*. The Court held the jury's inability to decide punishment was not an "acquittal" of the death penalty, and allowing the state to seek death at the retrial did not violate the Double Jeopardy Clause: "when petitioner appealed and succeeded in invalidating his conviction of the lesser offense, there was no double-jeopardy bar to Pennsylvania's retrying petitioner on both the lesser and the greater offense; his 'jeopardy' never terminated with respect to either." *Id*. at 113.

Sattazahn is inapposite: relator has not been sentenced, he is not seeking to have his sentence reversed, he is not asking for a new trial, and he is not relying on the Double Jeopardy Clause. Relator asks only to be sentenced to life imprisonment without probation or parole.

A hung jury at the penalty phase of a capital trial is different than all other hung juries.

Seeking to strengthen his argument – that the "general retrial statute," § 546.390, applies when a jury hangs at the penalty phase of a capital case (Resp.Br. 19) – respondent implies there is no difference between a hung jury at the penalty phase of a first degree murder case where the state is seeking death and a hung jury asked to decide the defendant's guilt or innocence (Resp.Br. 18). Respondent is incorrect: the difference is substantial.

Prior to 2003,[2] an ordinary criminal case proceeded in one phase at the end of which a jury rendered a verdict of guilt or innocence and (unless the defendant had prior convictions or waived jury sentencing) assessing sentence. §§ 546.390, 546.400, and 557.036, RSMo. 2000. If the jury was unable to agree upon punishment, the court would

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[2] Section 557.036 was amended in 2003 to provide for bifurcated trials in all criminal cases.

assess a sentence within the range of punishment authorized for the offense. §§ 557.036 and 558.011, RSMo. 2000.

The first phase of a capital trial – at which the jury is asked to determine guilt or innocence – is essentially the same as any other criminal trial in that if the jury is unable to agree upon a verdict of guilt or innocence, the case may be retried. *State v. Tiger*, 972 S.W.2d 385, 388-89 (Mo.App.W.D. 1998). If the jury returns a verdict of guilty of first degree murder, either the case proceeds to the penalty phase or, if the state waives death, the case proceeds to sentencing. § 565.030.1.

Unlike the guilt phase of a capital trial or the ordinary criminal trial, at the penalty phase of a capital trial the jury has already returned a verdict finding the defendant guilty of first degree murder; the second phase of a capital trial is strictly to determine punishment. For this reason, when a jury is unable to decide or agree upon punishment at the penalty phase of a capital trial, the case is in a very different posture than all other criminal cases in which the question of whether the state has proved the charges against the defendant remains undecided when the jury hangs.

Although under *Sattazahn*, a verdict of unable to decide is not an "acquittal" of the death penalty, 537 U.S. at 106-113, it is also not a "mistrial" as when a jury is unable to decide guilt or innocence in a non

capital case or when a jury in a capital case fails to return a verdict at the first phase of trial. Because this Court has ruled that there is only one offense of first degree murder,[3] the conviction of that offense must necessarily occur, if at all, at the first phase of trial. The penalty phase of trial – which under Missouri law, *e.g., State v. Cole*, convenes solely for the purpose of assessing a sentence – should not be treated as requiring a retrial when a jury returns a verdict of unable to decide or agree upon punishment.

Unlike a case in which there is instructional error, or error in the admission of evidence, or any other error prejudicing the defendant at the penalty phase – where setting aside the death verdict of the jury and remanding for new penalty phase proceedings is an appropriate disposition – a hung jury at penalty phase is not an "error" violating the defendant's rights.

When a jury hangs at penalty phase and does not return a verdict of death, even if the penalty phase trial was marred by trial court error, there still exists a verdict allowing the imposition of punishment

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[3] *State v. Cole*, 71 S.W.3d 163, 171 (Mo.banc 2002) ("Section 565.020 defines a single offense of first-degree murder with the express range of punishment including life imprisonment or death.")

authorized by the legislature for a person found guilty of first degree murder: life imprisonment. There is, quite simply, no basis and no authority for a retrial when a jury hangs at penalty phase, and the appropriate disposition is to impose a constitutionally permissible punishment. *See Whitfield*, 107 S.W.3d at 270 ("the remedy" for a hung jury is not "to order a new trial and give the State a second opportunity to convince a different jury to find the facts necessary for imposition of the death penalty" because "Missouri's statutes do not provide for this second bite at the apple").

In *Whitfield*, even though (as the trial court and this Court both found) there was no error prejudicing the defendant, the jury hung and this Court found the constitutionally permissible disposition was to impose a sentence of life imprisonment. Contrary to the holding of *Whitfield*, respondent ordered a new penalty phase trial in relator's underlying criminal case because he felt the effect of *Whitfield* was to invalidate the instructions that had been used at trial and this denied the *state* a fair trial[4] (Exhibit 2, pp. 19-23, 25-26, 38). Ordering a new trial, instead of imposing the constitutionally permissible sentence of

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[4] Relator has found no authority supporting this reason for ordering a new trial or a new penalty phase trial.

life imprisonment without probation or parole was an unauthorized action that penalized relator.

Section 565.040.1 – not section 546.390 – applies.[5]

Respondent strings together the following arguments: Prior to *Whitfield*, there was a conflict between § 565.030.4 and § 546.390 [presumably because § 565.030.4 provided a specific alternative to retrial] and therefore, under § 565.001.1, § 546.390 would not apply (Resp.Br. 20-21). *Whitfield* held unconstitutional "the provision of the statute permitting the court to determine the sentence when the jury fails to find the facts necessary to impose death" (Resp.Br. 21). "Because this Court did not rule the entirety of § 565.030.4 invalid, the determination of which part of the statute is invalid must be made in light of the legislative intent…." (Resp.Br. 22). By examining only "the offending portions of § 565.030.4," respondent finds it "clear that the legislative intent of the death penalty deliberation scheme was to have some finder of fact engage in the steps to determine whether to impose life or death, as it required the judge to undertake that determination if

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[5] Relator respectfully directs the Court's attention to his initial brief discussing why 565.040.1 applies, Rel.Br. at 21-23, and incorporates those arguments by reference as though fully set forth herein.

the jury was unable to agree on the punishment" (Resp.Br. 22). Thus, allowing a judge to undertake the multi-step determination without being able to consider the death penalty "would violate § 1.140, as it would violate the legislative intent that some finder of fact consider both life and death in reaching its verdict" (Resp.Br. 22).

Respondent adds a veiled attack on *Whitfield*: "to interpret any part of § 565.030.4 as requiring a life sentence to be imposed unless the jury finds all four of the steps of deliberation in favor of death would also violate the legislative intent, as the legislature clearly intended another finder of fact deliberate punishment if the first one could not reach a verdict" (Resp.Br. 22-23).

Respondent maintains, "the portion of the statute that permits the jury to be instructed that the court could hand down any sentence, either life or death, in the event of a hung jury, or permits the court to hand down either sentence, must be invalidated as the legislature never intended one punishment to be considered without the consideration of the other" (Resp.Br. 23).

Having thus invalidated "the entire portion of the statute permitting the court to sentence a capital defendant to life or death … under *Whitfield* and § 1.140," respondent asserts § 546.390 applies because

"chapter 565 contains no valid provision conflicting with the general statue regarding hung juries" (Resp.Br. 23).

Respondent is correct in stating *Whitfield* held "a trial court cannot constitutionally make the findings necessary under § 565.030.4 to determine whether or not to impose a death sentence" (Resp.Br. at 21 *citing Whitfield*, 107 S.W.3d at 261-62). But respondent's subsequent statement, "*Whitfield* holds unconstitutional … the provision of the statute permitting the court to determine the sentence when the jury fails to find the facts necessary to impose death," (Resp.Br. 21), is not actually contained in the opinion. Nowhere in *Whitfield* does the Court state it is holding any part of the statute unconstitutional; it is *not* readily apparent from the opinion that the Court held any part of § 565.030.4 unconstitutional or invalid.

If, in fact, no part of the statute is unconstitutional or invalid, there is nothing to sever or construe, 1.140 does not apply, and the severance and retrial proposed by respondent are unnecessary and excessive. In that event, there is a much simpler, constitutionally sound solution: until the legislature acts, when the jury hangs at penalty phase, the judge may proceed by imposing the constitutionally

permissible sentence of life imprisonment.[6]

There are additional reasons why the drastic severance proposed by

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[6] Justice Scalia's comments during the recent oral arguments in *United States v. Booker*, No. 04-104 *cert. granted* (Aug. 2, 2004), questioning whether provisions of the federal sentencing guidelines calling for federal judges to make sentence-enhancing factual findings are unconstitutional and must be "severed," address a somewhat comparable situation:

> JUSTICE SCALIA: Why do you -- why do you have to call it severability? Suppose we just said it's clear that whenever these facts have not been found by a jury, the guidelines cannot be applied? That the guidelines are unconstitutional, as applied, when there's been no jury finding, and leave it. We're not severing any particular language; we're just saying that that portion, that proceeding in that fashion produces and (sic) unconstitutional sentence. And then let the Government work out how it wants to find its way around that problem.

http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-104.pdf (Transcript at 99, lines 9-20).

respondent is improper. First, neither *Ring* nor *Whitfield* found judicial fact-finding resulting in a sentence of ***life*** unconstitutional. Imposing a sentence of life imprisonment does not require the judge to find facts increasing the sentence beyond that authorized by the jury's verdict at the first phase of trial.

Second, assuming for the sake of argument that respondent is correct and some portion of the statutory provision is unconstitutional, respondent's claim that the entire judicial fact-finding provision is unconstitutional, and must be severed, does not follow. Respondent's analysis founders on the fundamental rules of statutory construction, and the result is excessive and extreme.

When the words of a statute are plain and unambiguous, the court "will give effect to the language as written and will not resort to rules of statutory construction." *Martinez v. State*, 24 S.W.3d 10, 16 (Mo.App.E.D. 2000). If there is no ambiguity, "there is nothing to construe." *Id*.

"'The cardinal principle of statutory construction is to save and not to destroy."' *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) *quoting National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). 'It is our duty "to give effect, if possible, to every clause and word of a statute," ... rather than to emasculate an entire

section, as the Government's interpretation requires.' *Id. quoting Inhabitants of Montclair Township v. Ramsdell*, 107 U.S. 147, 152 (1883). An "elementary rule" of statutory construction "is that every reasonable construction must be resorted to in order to save a statute from unconstitutionality..." *Rust v. Sullivan*, 500 U.S. 173, 190 (1991).

"The primary purpose of statutory interpretation is to determine the intent of the legislature from the words used in the statute and give effect to that intent." *Missouri Commission on Human Rights v. Red Dragon Restaurant, Inc.*, 991 S.W.2d 161, 166-67 (Mo.App.W.D. 1999). "[I]nsight into the legislature's object can be gained by identifying the problems sought to be remedied and the circumstances and conditions existing at the time of the enactment." *Id.*; internal quotation marks omitted.

"[T]he fundamental rule of construction [is] that one part of a statute should not be read in isolation from the context of the whole act." *Martinez*, 24 S.W.3d at 16. "In ascertaining legislative intent it is proper that provisions of the entire act be construed together and, if reasonably possible, all provisions should be harmonized." *Id.* "Because a statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent, each part should be construed in connection with other parts, and 'it is not proper to

confine interpretation to the one section to be construed.'" *Id.* "'Related clauses are to be considered when construing a particular portion of a statute.'" *Id.*

Applying these rules to the instant case, and to respondent's analysis, reveals the following:

It is unnecessary to resort to statutory construction because the statutes, §§ 565.001.1 and 565.040.1, are plain and unambiguous and this Court may "give effect to the language as written and … not resort to rules of statutory construction." *Martinez*, 24 S.W.3d at 16. Section 565.001.1 unambiguously states, "The provisions of this chapter shall govern the construction and procedures for charging, trial, punishment and appellate review of any offense defined in this chapter and committed after July 1, 1984." Under § 565.001.3, the "provisions of 'The Criminal Code' or other law consistent with" Chapter 565 are to apply, but "[i]n the event of a conflict, the provisions of [Chapter 565] shall govern the interpretation of the provisions of [Chapter 565.]"

There is no conflict. Chapter 565 specifies only two instances when a retrial of the penalty phase is authorized. First, under §565.035.5(3), a penalty phase retrial is an authorized disposition on appeal when a defendant *previously sentenced to death* appeals. Second, § 565.040.1 provides that "when a specific aggravating circumstance found in a

case is held to be unconstitutional or invalid for another reason, the supreme court of Missouri is further authorized to remand the case *for resentencing or retrial* of the punishment pursuant to subsection 5 of section 565.03[5]." (Emphasis added).

That the legislature specifically authorized a retrial of the penalty phase in two instances demonstrates the legislature was aware of, and considered, the possibility of penalty phase retrials and specified when such retrials were authorized. The presumption, if any, is that the legislature did consider penalty phase retrials and chose not to provide for a retrial when the jury hung at penalty phase. Because the legislature specified in § 565.001.1 that Chapter 565's provisions were to "govern the construction or procedures for charging, trial, punishment or appellate review" of first degree murder cases, it must be presumed the legislature meant what it said and did not intend for the Courts to ignore the specific provisions of Chapter 565 – including § 565.040.1. *Menasche*, *supra*, 348 U.S. at 538-39 (The court's duty is to "give effect, if possible to every clause and word of a statute…").

Respondent's assertion that the "entire" judicial fact-finding procedure of § 565.030.4 is now invalid and that "chapter 565 contains no valid provision conflicting with the general statute regarding hung juries" (Resp.Br. 23) is insupportable. First, nothing in the law

precludes a judge from making findings of fact and sentencing a defendant to life imprisonment when a jury hangs at penalty phase; *Whitfield* and § 565.040.1 not only permit this: they require it.

If there is a need to divine the legislative intent in enacting § 565.030.4, then the Court must consider the entire statute. *Martinez*, *supra*, 24 S.W.3d at 16. Had respondent considered the entire statute, and not merely what he labels "the offending portions," (Resp.Br. 22), respondent would have realized that the legislative intent was to provide a constitutionally permissible procedure for imposing sentence.

Respondent violates fundamental rules of statutory construction by adopting a construction of the statute that makes no attempt to "save and not destroy" the statute and, instead, "emasculate[s] an entire section" *Menasche*, *supra*, 348 U.S. at 538-39. Had respondent considered the entire statute, and the specific judge-fact-finding provisions in the context of the entire act, *Martinez*, *supra*, 24 S.W.3d at 16, respondent would have realized that although the legislature utilized a multi-step procedure requiring specific findings before a defendant could be sentenced to death, the multi-step procedure was not, itself, the legislative intent. Rather, it was merely the procedure used to implement the legislature's intent of providing comprehensive, constitutionally permissible sentencing procedures to punish

defendants convicted of first degree murder.

But even if, for purposes of determining legislative intent, this Court considers only what the state labels "the offending portions," providing for a judge to follow the same procedure as a jury when the jury is unable to agree, these very portions themselves are good evidence of a legislative intent to avoid the expense and trouble of retrial – or perhaps repeated retrials. Indeed, the legislature took care to include "non retrial" alternatives to be employed when the primary sentencing procedures failed. These included judicial sentencing when the jury hung, § 565.030.4, and a provision for imposition of a sentence of life in the event the death sentence could not be imposed or a previously imposed death sentence had to be reversed. § 565.040; *State v. Duren*, 547 S.W.2d 476 (Mo.banc 1977).

In determining the legislative intent in enacting § 565.040.1, the words of this Court in *State v. Rowe*, 63 S.W.3d 647 (Mo.banc 2002), are instructive. The Court stated that the intent of the legislature must be "derived from the words of the statute itself" and "Courts do not have the authority to read into a statute a legislative intent that is contrary to its plain and ordinary meaning." *Id*. at 649-50. "[T]his Court, under the guise of discerning legislative intent, cannot rewrite the statute." *Id*. at 650. Nor may respondent rewrite the statute or the

legislative intent to serve his purposes.

Proper application of the rules of statutory construction demonstrates that the legislative intent, as evinced through the language of § 565.030.4(4), providing for the judge to determine punishment if the jury is unable to decide or agree, is to conclude the trial proceedings by assessing punishment – not to promote retrials. The holdings of *Ring* and *Whitfield* – under the Sixth Amendment, only a jury may make the findings allowing enhancement of punishment to death – does not change the legislative intent of providing a comprehensive, constitutional procedure for determining and imposing punishment in a capital case.

Respondent's authorities do not support his argument that "the determination of which part of the statute is invalid must be made in light of the legislative intent…" (Resp.Br. 22). *General Motors Corp. v. Director of Revenue*, 981 S.W.2d 561 (Mo.banc 1998), cited by respondent actually states, "The legislature is presumed to be familiar with section 1.140 and to have intended that this Court *give effect to the portions of the statute that are constitutionally valid*." *Id*. at 568; emphasis added.

With regard to severing, *National Solid Waste Management Association v. Department of Natural Resources*, 964 S.W.2d 818,

(Mo.banc 1998) cautions that excessive severance "is contrary to the mandate of the severance statute, section 1.140, RSMo., that 'all statutes … should be upheld to the fullest extent possible.'" *Id*. at 822 *citing Associated Industries v. Director of Revenue*, 918 S.W.2d 780, 784 (Mo.banc 1996).

"Preliminary to determining the need to sever one provision from another is whether one of the provisions in the statute is unconstitutional … legislative enactments carry a strong presumption of constitutionality." *Akin v. Director of Revenue*, 934 S.W.2d 295, 299 (Mo.banc 1996). "'The test of the right to uphold a law, some portions of which may be invalid, is whether or not in so doing, after separating that which is invalid, a law in all respects complete and susceptible of constitutional enforcement is left, which the legislature would have enacted if it had known that the exscinded portions were invalid.'" [Citation omitted.] *Id*. at 300. "[T]he legislature is presumed to have intended this Court to give effect to the parts of the statute which are not invalidated." *Id*. at 300-01. In the subsequent determination – whether the constitutional provisions survive if the unconstitutional portion is severed – legislative intent may be considered. *Id*.

Section 1.140 does not apply.

Section 1.140 provides for severance in the event a provision of a

statute is held to be unconstitutional. But § 1.140 only applies to statutory provisions where the section found unconstitutional is not "inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or *unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent*." Emphasis added.

According to respondent, all judicial fact-finding is invalid. Assuming for the sake of argument that respondent is correct, if § 1.140 were applied and the entire judicial fact-finding portion of the statute were severed out, the remaining provisions of § 565.030.4, "standing alone," would be "incomplete" and "incapable of being executed in accordance with the legislative intent." § 1.140. The invalid provisions are "inseparable" because without them, if a jury were to hang at penalty phase, there would be no provision for assessing and imposing sentence.

Severance under § 1.140 would result in a sentencing procedure that does not provide for sentencing and finality. The risk that there would never be a final adjudication is certainly not in accordance with the legislative intent or with the goals of the judicial system. *Sprung v.*

Negwer Materials, Inc., 727 S.W.2d 883, 886-87 (Mo.banc 1987) ("[A] primary goal of the judicial system is finality. Litigation must end if the public is to have confidence in the court's ability to resolve disputes").

Invalidating all of the judicial sentencing provisions of § 565.030.4 accomplishes nothing. Regardless of what or how much of that statute is severed, § 565.040.1 remains in effect. If the death penalty cannot be imposed – because the jury is unable to decide and judicial fact-finding to establish death-eligibility is unconstitutional or for any other reason – § 565.040.1 allows the court to sentence the defendant to life imprisonment. *Duren*, *supra*.

Contrary to respondent's argument (Resp.Br. 30-31), *Duren* holds that § 565.040.1 applies when the death penalty "could not be imposed for any reason." 547 S.W.2d at 480. Indeed, applying the rules of statutory construction discussed *supra*, the legislative intent that § 565.040.1 function as a "saving" statute in the event the death penalty cannot be imposed for any reason is evident both from its language and from the legislative history of that section as discussed in *Duren*. Section 565.040.1 provides a means of remedying what would otherwise be an irremediable situation, and the legislative intent was that it be utilized for that precise purpose.

Whitfield is correct, it requires relator to be sentenced to life

imprisonment, and § 565.030.4 does not "presume" death.

Respondent also appears to argue that the decision in *Whitfield*, prohibiting a penalty phase retrial and ordering the defendant to be sentenced to life, was based on §565.040.2, and §565.040.2 does not preclude a new penalty phase trial in the underlying criminal case because respondent has not sentenced relator to death (Resp.Br. 24).

Respondent's argument ignores the fact that it is only *after* holding[7] that §565.030.4 does not provide for a retrial of the penalty phase, when the jury returns a deadlocked verdict, that *Whitfield* discusses §565.040.2. *See Id*. at 271-72. Indeed, the Court's discussion of

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[7] Before discussing §565.040.2, the opinion reiterates it is "holding" that a new trial is required:

> In this circumstance, it would make defendant's victory a hollow one indeed if this Court were to hold that the remedy for the trial judge's failure to enter a life sentence is to remand to allow the State to seek the death penalty again at a new trial. The remedy must be to correct the error by imposing the sentence the judge should have imposed – life imprisonment without the possibility of probation or parole except by act of the governor.

107 S.W.3d at 270, n. 20.

§565.040.2 begins by referencing its previous holding – the "result of its analysis of §565.030.4: "This ***result*** is anticipated, and required, by section 565.040.2…" *Id*. at 271; emphasis added. Section 565.040.2 confirms that the Court reached the correct result, but the Court reached that result – its holding that the remedy must be a sentence of life imprisonment – independently of §565.040.2.

In an effort to bolster his arguments by demonstrating there is no presumption in favor of a life sentence respondent claims, "a life sentence is not presumed *unless* all of the steps [of §565.030.4] are found to favor death by the trier" (Resp.Br. 28). Respondent takes the statute's directive – "The trier shall assess and declare the punishment at life… (1) If [the jury makes any one of the findings required by the statutory steps]" – to mean that "a life sentence is not presumed *unless* all of the steps are found to favor death[8] by the trier" (Resp.Br. 28; emphasis in original). This is hardly the "plain and ordinary" meaning of either the word "if" or the entire statutory procedure (quoted by

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[8] Relator suggests respondent intended to say "a life sentence is not presumed *unless* all of the steps are **not** found to favor death[8] by the trier" or "a life sentence is not presumed *unless* all of the steps are found to favor **life** by the trier" (changes in underlined, bold font).

respondent) for determining sentence.

Ignoring the statute's plain language – setting out four circumstances in which the trier *must* declare punishment at life imprisonment – respondent claims that the statute intends that *only* in those circumstances may the trier declare punishment at life imprisonment.

Respondent's "interpretation" of the statute cannot be reconciled with the plain and unambiguous language of the statute. The language of the statute contains nothing supporting this "interpretation." The Court must reject this argument.

Mr. Mayes is not seeking a new penalty phase trial. "In this circumstance, it would make defendant's victory a hollow one indeed if this Court were to hold that the remedy for the trial judge's failure to enter a life sentence is to remand to allow the State to seek the death penalty again at a new trial." *Whitfield*, 107 S.W.3d at 270, n. 20. "The remedy must be to correct the error by imposing the sentence the judge should have imposed – life imprisonment without the possibility of probation or parole except by act of the governor." *Id.*

CONCLUSION

For the foregoing reasons, respondent's arguments fail. The Court must issue the writ of prohibition to which relator is entitled ordering Judge Wiggins to take no action other than sentencing relator to life imprisonment without the possibility of probation or parole.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, the undersigned attorney, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06(b). According to the "Word Count" function of Microsoft "Word," the brief contains a total of _____ words.

The floppy disk filed with this brief contains a copy of this brief. It has been scanned for viruses by a McAfee VirusScan program and according to that program is virus-free.

A true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this ___ day of _____, 20___, to counsel for respondent, Richard Starnes, Office of the Attorney General, P. O. Box 899, Jefferson City, Missouri 65102, (573) 751-3321, and an email containing this brief as an attachment was sent to counsel for respondent, Richard Starnes, at Richard.Starnes@ago.mo.gov, this ___ day of _____, 20___.

_____
Attorney for Relator